situation and if there is injustice, the court is not only entitled to but is obliged to make any order as may be necessary to prevent the injustice.

In the instant case, O 32 r 6 gives the court the jurisdiction to set aside the ex parte order absolute. Alternatively, if O 32 r 6 is not applicable in an O 49 situation, then the court has the jurisdiction to set aside the order invoking its inherent jurisdiction. I will now hear arguments on the merits.

*Order accordingly.*

Solicitors: *Vincent Lim & Teoh.*

Reported by *Kevin Mathews*

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## Perwira Habib Bank Malaysia Bhd v Oon Seng Development Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24(31)-540-87
MOHAMED DZAIDDIN J
5 OCTOBER 1989

*Land Law — Order for sale of charged property — Application to oppose order — Prior purchasers claiming — Whether prior purchasers have shown 'cause to the contrary' — National Land Code 1965, s 256(3)*

The plaintiffs applied against the first defendants for an order for sale to sell the charged property, which was granted on 13 September 1989. The second, third and fourth defendants, in opposing the said application, prayed that no order for sale be made against their respective individual lots on the ground that they were bona fide purchasers for value of these lots affected by the said order. The sole issue in these applications by the second, third and fourth defendants is whether or not they have shown a 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965.

**Held,** dismissing the defendants' application:

(1) The second, third and fourth defendants have failed to show any 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965 to enable the court to refuse the plaintiffs' application to sell the lots in the application.

(2) As bona fide purchasers for value, their interest cannot prevail over that of the plaintiffs, the registered chargee. Unless fraud is an issue and could be proved, the charge which had been legally registered becomes indefeasible.

(3) As the purchase agreement contained an express condition that the lot was sold subject to an existing charge in favour of the plaintiffs, the interest of the purchaser who had expressly consented to the creation of the said charge cannot override the registered interest of the plaintiffs as chargee.

(4) There was no suggestion by the second, third and fourth defendants that the charge created by the first defendants in favour of the plaintiffs was fraudulent or was intended to defeat the interest of the purchasers under the purchase agreement. On the other hand, it would be implied that they knew of the incumbrances attached to the sale of these lots.

**Cases referred to**

1 *Keng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 (folld)
2 *Tai Lee Finance Co Sdn Bhd* v *Official Assignee & Ors* [1983] 1 MLJ 81 (folld)

**Legislation referred to**

National Land Code 1965 s 256(3)

*Khaw Cheow Poh* for the plaintiffs.
*Margeret Kam Swee Lin (Miss)* for the first defendants.
*See Ewe Lin* for the second defendants.
*Goh Eng Kee* for the third defendants.
*Syahril Redwan* for the fourth defendants.

*Cur Adv Vult*

**Mohamed Dzaiddin J:** Arising from an application by the plaintiffs against the first defendants for an order for sale under s 256 of the National Land Code 1965 to sell the charged property, the said order of which was granted by me on 13 September 1989, the second, third and fourth defendants, in opposing the said application, prayed that no order for sale be made against their respective individual lots on the ground that they were bona fide purchasers for value of these lots affected by the said order.

From the supporting affidavits of these defendants, I accept that they were purchasers of the individual lots under the schedule to the annexure of the charge executed by the first defendants with the plaintiffs. All of them executed the sale and purchase agreements with the first defendants. They claimed that they had fully paid the purchase price of their lots, which they had raised through government housing loans. Although the second defendants did not exhibit a copy of the said agreement to the affidavit of Mr Wong Soon Fong, nevertheless, from a copy made between the first defendants as vendor and the third defendant as purchaser dated 1 April 1982, it is clearly stated that the whole piece of the property before subdivision was charged by the vendor to the plaintiffs with the knowledge and approval of the purchaser. As for the fourth defendant, he claimed to be entitled to his respective lots in accordance with the terms of an agreement which he entered with the first defendant on 16 November 1978, which is the subject matter of an action pending in this court.

Counsel for the second and third defendants submitted that their clients were bona fide purchasers for value of the respective lots affected by the order dated 13 September 1989. In the case of the fourth defendant, he claimed to have a prior right to the affected lots because he had already paid the total purchase price before the said property was charged by the first defendants to the plaintiff. Hence, on the above grounds they urged the court to

grant the order for sale only in respect of those lots which had not been sold to them by the first defendants.

Therefore, the sole issue in these applications by the second, third and fourth defendants is whether or not they have shown a 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965.

Having considered the facts and circumstances of the whole matter and following the judgment of the Privy Council in *Keng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Anor*,[1] in my judgment, the second, third and fourth defendants have failed to show any 'cause to the contrary' within the meaning of s 256(3) of the National Land Code 1965 to enable me to refuse the plaintiffs' application to sell the lots in the application.

First, as bona fide purchasers for value, their interest cannot prevail over that of the plaintiffs, the registered chargee. Unless fraud is an issue (which is not so here) and could be proved, the charge which had been legally registered becomes indefeasible (*Tai Lee Finance Co Sdn Bhd* v *Official Assignee & Ors*[2]). Secondly, as the purchase agreement, in particular of the third defendant, contained an express condition that the lot was sold subject to an existing charge in favour of the plaintiffs, the interest of the purchaser who had expressly consented to the creation of the said charge cannot override the registered interest of the plaintiffs as chargee. Relying on the principle in *Keng Soon Finance Bhd*,[1] this was effective as an authority by the purchaser to the first defendants to charge the property to the plaintiffs. In the case of the fourth defendant, even the knowledge of the plaintiffs (assuming that they knew that some of the lots had been earlier sold to the fourth defendant) of the prior interest of the purchasers before the creation of the charge could not, on the authority of *Keng Soon Finance Bhd*,[1] constitute 'a cause to the contrary'. Thirdly, despite the omission of the second defendants to exhibit a sale and purchase agreement with the first defendants in the affidavit of Mr Wong, there was no suggestion by them that the charge created by the first defendants in favour of the plaintiffs was fraudulent or was intended to defeat the interest of the purchasers under the purchase agreement. On the other hand, based on the purchase agreement of the third defendant, it would be implied that they knew of the incumbrances attached to the sale of those lots.

In the light of the above, there is nothing this court can do except to sympathize with the predicament faced by these purchasers. Perhaps, the remedy available would be for these defendants to sue the first defendants for damages for breach of contract, ie the sale and purchase agreement. In the circumstances, I confirm the order made on 13 September 1989 in respect of the plaintiffs' application. The second, third and fourth defendants shall pay the costs of this application to the plaintiffs to be taxed by the registrar.

*Application dismissed.*

Solicitors: *JB Lim & Suhaimi; Kam & See; Goh Eng Kee & Co; VM Mohan.*

Reported by *Kevin Mathews*